SERVED: May 13, 1992

NTSB Order No. EM-164

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of May, 1992

J. W. KIME, COMMANDANT,
United States Coast Guard,

v.

ME-150

ALFRED E. AILSWORTH,

Appellant.

OPINION AND ORDER

Appellant seeks review of a decision of the Vice Commandant (acting by delegation, Appeal No. 2532, dated December 2, 1991) affirming a ruling entered by Coast Guard Administrative Law Judge Peter A. Fitzpatrick on January 22, 1990, following an earlier evidentiary hearing.[1] The law judge sustained charges of misconduct and negligence against the appellant and ordered the

[1]Copies of the decisions of the Vice Commandant and the law judge are attached. The law judge's order on sanction, also attached, is dated February 8, 1990.

outright suspension of all of his merchant mariner licenses (including License No. 542230) and documents for a period of twelve (12) months. For the reasons discussed below, we will deny the appeal, to which the Coast Guard has filed a reply in opposition.[2]

The charges against the appellant stem from his operation of a tug-barge flotilla that ran into a marina, causing damage to piers and several sailing vessels moored there. The allision resulted, the parties appear to agree, because the appellant was unable to check the drift of his flotilla toward the marina once his engine shut down after the throttles were moved to the full astern position and, apparently, the engine revved to the speed at which it was designed to cutoff. The parties do not agree, however, on whether appellant knew or should have known that his actions would or could cause the tug to lose propulsive power in the manner it did; that is, whether appellant is fairly chargeable with knowledge of the overspeed trip on the TUG MILDRED A's engine, a mechanism whose purpose is to protect the engine by keeping it from revving past 900 revolutions per minute (RPM).[3]

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[2]Our action in denying appellant's appeal from the suspension of his license moots his subsequently filed appeal from the Vice Commandant's denial (Appeal no. 2534, dated February 5, 1992) of his request for a stay of the suspension order pending review by the Board.

[3]After the incident, the appellant had a speed governor installed on the engine to prevent it from revving up to the overspeed trip cutoff.

The law judge concluded that the overspeed feature of the tug's engine was a "characteristic" of the vessel's "main propulsion" with which appellant, under 46 CFR 15.405, was obligated to become familiar.[4] Inasmuch as the appellant's stalling of the engine during the subject allision reflected, in the law judge's opinion, an inadequate familiarity with a design restriction on the vessel's available power, the law judge found that appellant had operated the tug in violation of the regulation and was, therefore, guilty of misconduct as charged.[5]

The charge of negligence against appellant was predicated solely on the presumption of negligence that arises in marine cases when a moving vessel strikes a stationary object. The law judge, citing, among other cases, Commandant v. Murphy, NTSB Order No. EM-139 (1987), reconsideration denied, NTSB Order No. EM-144 (1987), rejected appellant's contention that the engine

[4]The text of 46 CFR 15.405 is set forth on pages 12-13 of the law judge's January 22, 1990 decision.

[5]It is clear from the record that the appellant was, in fact, aware of the overspeed trip on the tug's engine, though he appears to have believed that the device would be activated at an engine speed below 900 RPM. We note in this connection that appellant, almost immediately after the engine shut down, left the bridge and went to the engine room two floors below to restart the engine by resetting the trip, a corrective action he would not have been aware of without knowledge of the overspeed device. In light of this, we construe appellant's testimony that he didn't know the engine would shut off if the throttles were placed in full astern to mean no more than that he had never experienced a shut off. Whether this means that he had never in his seven years of ownership of this tug moved the throttles to the full astern position or that he had previously done so without the engine cutting off is not clear from the record before us.

shutdown was not a foreseeable circumstance, determined that appellant had not rebutted the presumption of negligence the allision with the marina created, and found the charge of negligence to have been proved.

On appeal to the Board, the appellant raises the same arguments he presented to the Vice Commandant, who, for reasons fully detailed in his decision, found no merit in his challenges to the law judge's disposition of the matter.[6] We have carefully reviewed appellant's arguments in light of the Vice Commandant's decision and find no error in his determinations that the overspeed trip on the TUG MILDRED A's engine was a characteristic of that vessel's main propulsion system with which appellant was required to be familiar under 46 CFR §15.405 and that such a reading of the regulation in this case does not amount to requiring the appellant to have had the detailed knowledge of a diesel engineer in order to be in compliance. Further, we find no error in the judgments that appellant's evidence did not rebut the presumption of negligence in the case and that the sanction ordered by the law judge was not excessive.[7] As to the latter

[6]Appellant's brief on appeal does not undertake to explain the bases for his apparent disagreement with the Vice Commandant's analysis of the issues.

[7]The severity of the sanction ordered by the law judge clearly reflects his thoroughly explained conclusion that "respondent's failure to familiarize himself with the exact threshold at which the overspeed trip would shut down his tug's engine during the seven years he owned and operated that vessel, reflects a callous disregard for the most basic principle of good seamanship and the safety of life and property at sea"(February

point, however, additional comment is warranted.

Appellant urges us to find that the sanction ordered by the law judge (i.e., 6 month suspension on each of the two charges) is excessive, arguing, inter alia, that the law judge did not give adequate or appropriate weight to appellant's remedial efforts or his "almost" spotless record. However, appellant has not directed our attention to any precedent which would support a conclusion that the suspension imposed on him should be reduced, and we are not persuaded that the law judge's decision to impose the maximum suggested suspensions under 46 CFR §5.569 for the charges against appellant amounted to an abuse of discretion.

In the first place, we do not agree that the fact that appellant had an engine speed governor installed on the tug after the subject incident qualifies as remedial action, for, as the law judge recognized, if appellant had properly familiarized himself with the vessel's operating characteristics when he acquired it, he would have either appropriately modified the engine or avoided overspeeding it and, thereby, eliminated the risk that an incident such as the one that concerns us here would occur. We do not think his after-the-fact effort to prevent a recurrence in any way diminishes the seriousness of his prior conduct or constitutes an exonerating circumstance. Second, we cannot agree that the law judge's decision on sanction does not

(..continued)
8, 1990 Order at page 3).

adequately consider appellant's record. To the contrary, we concur in the law judge's apparent assessment that the four month suspension appellant had served some seven years earlier undercut any claim that he was entitled to the consideration that might be given a mariner with an unblemished, exemplary career.

Finally, appellant contends that the law judge's decision on sanction should be overturned because of statements he made that appellant submits "reveal a total lack of fairness and impartiality". See February 6, 1990 hearing transcript at pp. 360-62. We do not concur. Although the law judge was clearly doubtful that a suspension of any duration would bring about a positive change in what he perceived to be appellant's negative compliance disposition, neither his skepticism in that regard, nor his suggestion that appellant might not even honor a suspension, supports any contention that the law judge did not decide the matter objectively. More to the point, we do not agree that the law judge lacked the requisite fairness and impartiality by expressing the opinion, based on his observations of an appellant whose credibility he found in many respects to be wanting, that nothing he could do would likely cause appellant to respect the laws applicable to his maritime operations. In sum, we perceive no basis for second-guessing the law judge's efforts to tailor a sanction to the facts and circumstances relevant to his adjudication of this matter.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied, and

2. The Vice Commandant's decision affirming the decision and orders of the law judge is affirmed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.